

***United States Court of Appeals  
for the Second Circuit***



**APPENDIX**





76-1212

To be argued by  
JOSEPH L. BELVEDERE

B  
P  
S

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

DOCKET NO. 75 CR 772

HECTOR CHRISTIAN,

Appellant,

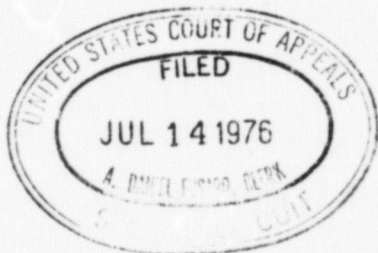
v.

UNITED STATES OF AMERICA,

Appellee.

On Appeal From the United States District Court  
For the Eastern District of New York

APPENDIX FOR APPELLANT HECTOR CHRISTIAN



JOSEPH L. BELVEDERE  
ATTORNEY AT LAW  
4518-11TH AVENUE  
BROOKLYN, N. Y. 11219

GEDNEY 5-6087

PAGINATION AS IN ORIGINAL COPY



To be argued by  
JOSEPH L. BELVEDERE

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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DOCKET NO. 75 CR 772

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HECTOR CHRISTIAN,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee,

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On Appeal From the United States District Court  
For the Eastern District of New York

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APPENDIX FOR APPELLANT HECTOR CHRISTIAN

---

JOSEPH L. BELVEDERE  
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(212) 435-8087

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The Docket Entries	A
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UNITED STATES DISTRICT COURT - CRIMINAL DOCKET

Felony ☐ JUDGE/MAGISTRATE 0712  
 or Offense ☐ Assigned Trial  
 Misdemeanor ☐ 267 1 District Office  
 Dis./Sentence

U.S. vs.

75 CR 772-3

Case Filed Day Mo. Yr. 10 10 75  
 Docket No. 772  
 No. of Defendants 1  
 Case No. 75-772-4-5

HECTOR CHRISTIAN

defendant

U.S. CODE SECTION

21:846

OFFENSES

Did conspire to distribute cocaine

COUNTY 1

MAGR. CASE NO.

BAILEY RELEASE

☐ Personal Recognizance  
☐ Denied  
☐ Unsecured Bond  
☐ Conditional Release  
 Set (0/10) \$ 50  
☐ 10% Deposit  
☐ Surety Bond  
☐ Collateral  
☐ Bail Not Made  
☐ 3rd Party Custody  
☐ Bail Status Changed (See Docket)  
☐ PSA

U.S. Attorney or Asst.

Carol Anon

Joseph Belvedere 4518 11th Ave.  
 Brooklyn, N.Y. 11219 435-8087

ARREST

INDICTMENT

ARRAIGNMENT

TRIAL

SENTENCE

U.S. Custody  
 Begun on Above  
 Charges

High Risk  
 Defn. &  
 Date Design'd

Information  
 10/21/75

Waived  
 Superseding  
 Indict/Info

10/22/75

1st Plea  
 Final Plea

Trial Set For  
 1/19/76

☒ Not Guilty  
☐ Nolo  
☐ Guilty  
☐ Not Guilty  
☐ Nolo  
☐ Guilty

Voir Dire  
 2/23/76

Trial Began  
 2/23/76

Trial Ended  
 2/27/76

Disposition

☒ Convicted  
☐ Acquitted  
☐ Dismissed  
☐ Nolle/Discontinued  
☐ On All Charges  
☐ On Lesser Offense(s)  
☐ WOP; ☐ W

Prosecution Deferred

Search Warrant

Issued  
 Return

DATE

INITIAL/NO.

INITIAL APPEARANCE

INITIAL/NO.

OUTCOME

Summons

Issued  
 Served

DATE

INITIAL/NO.

INITIAL APPEARANCE

INITIAL/NO.

OUTCOME

Arrest Warrant

Issued

DATE

INITIAL/NO.

INITIAL APPEARANCE

INITIAL/NO.

OUTCOME

COMPLAINT

Issued

DATE

INITIAL/NO.

INITIAL APPEARANCE

INITIAL/NO.

OUTCOME

OFFENSE  
 (In Complaint)

DATE

INITIAL/NO.

INITIAL APPEARANCE

INITIAL/NO.

OUTCOME

Show last names and suffix numbers of other defendants on same indictment/information

Armando Esparza-1, John Doe-2

10/21/75 Before NEAHER, J.- Indictment filed- bench warrant ordered and issued  
 10/22/75 Before MISHLER, CH.J.- Case called- Deft and counsel not present-deft arraigned and others a plea of not guilty-bail set at \$50,000.00 P.R. Bond - deft's wife to sign bond trial set for 1/19/76  
 10/22/75 By MISHLER, CH.J.- Order appointing counsel filed  
 10/22/75 Financial affidavit filed  
 10-29-75 Govts Notice of Readiness for Trial filed.  
 11/28/75 Notice of motion for inspection etc. filed ret. 12/19/75  
 12/19/75 Before MISHLER, CH.J.- Deft's motion for discovery and inspection, etc. withdrawn (see letter).  
 12/19/75 Letter dated 12/16/75 filed from J. Belvedere to J. Mishler  
 1-19-76 Before Mishler, Ch J - case called - deft present with counsel Joseph Belvedere present- Trial ordered & Begun-trial contd to Jan. 20, 1976.  
 1-21-76 Before MISHLER, CH. J. - Case called. Deft & counsel present. Interpreter Emil Rodriguez present. Trial resumed. Trial continued to 1-22-76 at 10 A.M.

V. Excludable Delay

(a) (b) (c) (d)

OPPOSITE THE APPLICABLE DOCKET ENTRIES IN SECTION IV SHOW, IN SECTION V, ANY OCCURRENCE OF EXCLUDABLE DELAY PER 18 USC §3161(h) - "SPEEDY TRIAL ACT".

		(a)	(b)	(c)	(d)
1/22/76	Before MISHLER, CH. J. - Case called- Deft and counsel present- Interpreter E. Rodriguez present- Trial resumed- Govt rests- Motion by deft to dismiss the indictment is denied- All defts rests-Trial cont'd to 1/26/76				
1/26/76	Before MISHLER, CH. J. - Case called- deft and counsel present- Interpreter present- Trial resumed-jury retires to deliberate-trial contd to 1/27/76				
1/26/76	By MISHLER, CH. J. - Two(2) orders of sustenance filed				
1-27-76	Before MISHLER, CH J - case called - defts & attys present - Interpreter E. Rodriguez present - trial resumed - at 10:00 am the Jury resumed their deliberations - at 4:30 PM Jury returned and said they could not reach a verdict - mistrial declared - Feb. 23, 1976 for new trial.				
1-27-76	3 stenographers transcripts filed (pgs 1 to 688)				
1-27-76	By MISHLER, CH J - Order of sustenance filed.				
2-4-76	Voucher for Expert Services filed.				
2-5-76	75 M 1832 inserted in CR file				
2-11-76	Stenographers transcript filed dated Jan. 26. 1976				
2/23/76	Before MISHLER, CH. J. - Case called- deft and counsel present- trial ordered and begun- jurors selected and sworn-trial contd to 2/24/76				
2-24-76	Before MISHLER, CH J - case called - deft & atty present - trial resumed - trial contd to 2-25-76. Interpreter E. Rodriguez present.				
2-25-76	Before MISHLER, CH J - case called - deft & atty present - trial resumed - Govt rests - motion by defts to dismiss the indictment is denied - Govt rests - motion by deft for judgment of acquittal is denied - trial contd to 2-26-76				
2/26/76	Before MISHLER, CH. J. - Case called- deft and counsel present - trial resumed-jury retires to deliberate trial contd to 2/27/76				

2Y26/76	By MISHLER, CH J. - Order of sustenance filed				
2-27-76	Before MISHLER, CH J - Case called - deft & counsel Joseph Belvedere present - Interpreter Emil Rodriguez present - trial resumed - At 10:00 am the Jury retired for further deliberations - at 1:10 PM the jury returned and rendered a verdict of guilty on count one as to the deft - Jury polled and jury discharged - trial concluded - motions by all defts to set aside the verdict is denied - Memorandum of verdict signed and ordered filed - bail conditions contd - sentence adjd without date.				
2-27-76	Memorandum of verdict filed.				
2-27-76	By MISHLER, CH J - Order of sustenance signed (Lunch)				
3-1-76	Stenographers transcript filed dated 2-27-76				
5-7-76	Before MISHLER, CH J - case called - deft & counsel J. Belvedere present - deft sentenced on count 1 to imprisonment for a period of 2 years plus special parole term of 3 years. Clerk to file Notice of Appeal without fee. Bail contd pending appeal (\$50,000 PRB)				
5-7-76	Judgment & commitment filed - certified copies to Marshal.				
5-7-76	Notice of appeal filed. (without fee)				
5-7-76	Docket entries and duplicate of Notice mailed to the C of A				
6-2-76	Record on appeal certified and mailed to the Court of appeals.				

(a) Interval (per Section II)  
 (b) Start Date  
 (c) End Date  
 (d) Ltr Code  
 (e) Total Days

BEST COPY AVAILABLE



CLERK'S CERTIFICATE

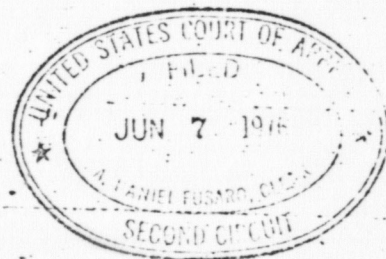
UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-vs-

ARMANDO ESPARZA et al

75 CR 772



I, LEWIS ORGEL, Clerk of the United States District Court for the Eastern District of New York, do hereby certify that the foregoing copy of the Docket Entries from A to B and the original papers numbered from page 1 to 33 constitute the Record of Appeal.



I further testify that the last day to file said  
record is \_\_\_\_\_.

IN TESTIMONY WHEREOF, I have caused the seal of said  
Court to be hereunto affixed, at the Borough of Brooklyn in  
the Eastern District of New York, this 2nd day of June

in the year of our LORD, One Thousand Nine Hundred  
and seventy-six and of the Independence of the United States  
~~Two One Hundred and~~ \_\_\_\_\_.

LEWIS ORCEL

CLERK

By: \_\_\_\_\_

DEPUTY CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

- - - - - X

UNITED STATES OF AMERICA

- against -

ARMANDO ESPARZA,  
JOHN DOE, also known as  
"Leo Gonzalez", and  
HECTOR CHRISTIAN,

Defendants.

- - - - - X

THE GRAND JURY CHARGES:

COUNT ONE

On or about and between the 16th day of May, 1975 and the 31st day of May, 1975, both dates being approximate and inclusive, within the Eastern District of New York, the defendants ARMANDO ESPARZA, JOHN DOE, also known as "Leo Gonzalez" and HECTOR CHRISTIAN did knowingly, wilfully and unlawfully combine, conspire, confederate and agree together and with each other to knowingly and intentionally distribute a quantity of cocaine, a Schedule II narcotic drug controlled substance in violation of Section 841(a)(1) of Title 21, United States Code. (Title 21, United States Code, Section 846).

COUNT TWO

On or about the 29th day of May, 1975, within the Eastern District of New York, the defendants ARMANDO ESPARZA and JOHN DOE, also known as, "Leo Gonzalez", did knowingly and intentionally possess with intent to distribute approximately 115 grams of cocaine, a Schedule II narcotic drug controlled substance. (Title 21, United States Code, §841(a)(1) and Title 18, United States Code, §2)

75 CR 772

I N D I C T M E N T

Cr. No. \_\_\_\_\_  
(T. 21, U.S.C. §841(a)(1))

FILED  
IN CLERK'S OFFICE  
U.S. DISTRICT COURT ED NY

OCT 21 1975

TIME A.M. ....  
P.M. ....




- 2 -

COUNT THREE

On or about the 29th day of May, 1975, within the Eastern District of New York, the defendants ARMANDO ESPARZA and JOHN DOE, also known as, "Leo Gonzalez", did knowingly and intentionally distribute approximately 115 grams of cocaine, a Schedule II narcotic drug controlled substance. (Title 21, United States Code, §841(a)(1) and Title 18, United States Code §2).

A TRUE BILL

  
\_\_\_\_\_  
DAVID G. TRAGER  
UNITED STATES ATTORNEY  
EASTERN DISTRICT OF NEW YORK

  
\_\_\_\_\_  
FOREMAN

No. \_\_\_\_\_

UNITED STATES DISTRICT COURT

EASTERN District of NEW YORK

CRIMINAL Division

THE UNITED STATES OF AMERICA

vs.  
ARMANDO ESPARZA, JOHN DOE, A/K/A  
"Leo Gonzalez", and  
HECTOR CHRISTIAN,

Defendants.

INDICTMENT

Title 21, United States Code,  
Section 841(a) (1)

A true bill,

Foreman.

Filed in open court this \_\_\_\_\_ day  
of \_\_\_\_\_, A. D. 19\_\_\_\_

Clerk.

Bail, \$\_\_\_\_\_

GPO 902-482

Carol B. Amon, AUSA  
(212) 596-4620



ek/ss  
2am5

1  
2 THE COURT: You have before you a paper  
3 which is called a Memorandum of Verdict. I call  
4 it that only because I don't know what else to  
5 call it. It is intended only so that you remember  
6 which defendants are charged with which crime. You  
7 must understand that the defendants have pleaded not  
8 guilty to all of the crimes. This is just so that  
9 when you come to consider the evidence you will  
10 understand that you are to focus on the crimes  
11 charged in the indictment against each defendant.

12 Of course in this trial we have all three  
13 defendants charged with Count I, which is the  
14 conspiracy count. The two defendants charged with  
15 Count II are Esparza and Gonzalez, and the two  
16 defendants charged with Count III are also  
17 Esparza and Gonzalez. You will find that Counts  
18 II and III are just the one transaction, the  
19 charge that the cocaine was delivered on May 29th.  
20 But the statute permits the possession and sale  
21 to be two separate crimes, first possession with  
22 intent to distribute and then, when you distribute  
23 or sell it, it is considered a separate crime. I  
24 tell you this at the outset because you must  
25 consider each defendant and you must consider the

## Charge

evidence against each defendant as to each crime charged so that in effect there are seven trials because there are seven verdicts here.

When we talk about the law in the case, I think it is good to understand the function that all the participants in the trial have:

First we have the lawyers, the lawyers are adversaries, that means that they take sides, contradictory sides, on each issue. They take positions against each other, the government on the one hand and the defendants collectively on the other, though not all the defendants take exactly the same position, nor do they have to take the same position nor do all the defendants contest every issue in the trial. To simplify it, we have the government on one side and the defendants on the other.

This is different than other forms of procedure or concepts as to how trials are conducted in civil law and in most countries of Europe, or in all countries of Europe or I would think in western Europe except in England where they have the accusatory system. The theory is that when lawyers have comparable ability and contest over



## Charge

3 1  
2 an issue the evidence will be developed during  
3 the trial. So the role of the lawyer is really  
4 to develop the evidence and at the same time  
5 represent his client and because they represent  
6 different clients, they are protagonists, they  
7 take positions as to an issue and their effective-  
8 ness really in measure depends on their zeal.  
9 Sometimes you will find that in the Court's  
10 opinion they might overreach a little, there might  
11 be occasions to reprimand, but you should in no  
12 way count that or charge that against the client,  
13 that is the function of the lawyer. Don't be  
14 concerned or be upset because a lawyer might  
15 object or object repeatedly, that is his function.

16 My function here is to rule on those  
17 objections and to treat the matter objectively and  
18 even-handedly and based on what I understand the  
19 law to be. That is all it is, it is an impersonal  
20 thing, there is nothing personal in the rulings or  
21 the statements that I make.

22 The jury and the Court, as distinguished  
23 from the attorneys, are objective, dispassionate,  
24 free of the emotion that arises from the lawyers'  
25 involvement with their clients' cause, and that is

4 1

## Charge

2 the way it should be. But as between the Court  
3 and jury, there is a clear line of demarcation  
4 as to both function and authority and role that  
5 each plays. The jury is the sole judge of the  
6 facts and the jury is a judge in the true sense  
7 of the word. You and you alone determine what  
8 happened. The Court, on the other hand, is the  
9 sole judge of the law, and just as I must accept  
10 your findings as you make them and your ultimate  
11 verdict in the case, so you must accept the law  
12 as I charge it. You may disagree with it, it may  
13 appear to be distasteful, it may appear to be  
14 illogical to you, but you must accept it at face  
15 value and apply it to the facts as you find them  
16 and then arrive at your decision as to the guilt  
17 or innocence of each defendant as to each crime  
18 charged.

19 A most important principle in American and  
20 in Anglo-American jurisprudence it is the  
21 presumption of innocence. Every defendant charged  
22 with a crime is presumed to be innocent. That  
23 means that you must conclude at the outset of the  
24 trial that all of the defendants are innocent of  
25 all the crimes charged, and that conclusion remains



## Charge

1  
2 with them throughout the trial and throughout your  
3 deliberations and gives way or is overcome only as,  
4 if and when the government proves the guilt of the  
5 defendant by proof beyond a reasonable doubt.

6 Now I may be using "defendant" in a  
7 collective sense and "defendants" in the plural  
8 sense, and it refers to all of the defendants  
9 unless I single out and charge that it refers  
10 solely to a defendant or to two defendants.

11 The presumption of innocence alone is  
12 sufficient to acquit a defendant.

13 I would like to refer to what is known as  
14 a "Scotch verdict." In Scotland there are three  
15 verdicts, guilty, not guilty, and not proved. In  
16 this country we only have two verdicts, guilty and  
17 not guilty, but not guilty includes not proved.

18 (Continued next page.)  
19  
20  
21  
22  
23  
24  
25

1 THE COURT: (continued) I have said that  
2 before you may find the defendant guilty of the crime  
3 charged, the Government must prove his guilt by proof  
4 beyond a reasonable doubt. A reasonable doubt is a  
5 doubt which a reasonable person has after weighing all  
6 the evidence. It is a doubt based on reason and  
7 common sense and experience and the state of the record  
8 as distinguished from a doubt based on emotion as  
9 arises from a distaste to perform an unpleasant task  
10 or a doubt that arises from a whim or speculation.  
11 A reasonable doubt is not a vague or imaginary doubt;  
12 it is a kind of a doubt that will make a reasonable  
13 person hesitate to act in a matter of importance to  
14 himself.  
15

16 Proof beyond a reasonable doubt is therefore  
17 proof of such a convincing character that you would be  
18 willing to rely and act upon it unhesitatingly in the  
19 most important of your own affairs.

20 The defendant has no obligation to offer any  
21 proof of innocence. A defendant has the right to rely  
22 on the failure of the Government to prove his guilt  
23 beyond a reasonable doubt.

24 The Government's burden is not to prove guilt  
25 beyond all doubt or all possible doubt; it is to prove



1 the guilt of the defendant beyond a reasonable doubt.  
2 The Government is not obliged to prove that every bit  
3 of evidence that it offered is true beyond a reasonable  
4 doubt, the Government's burden is to prove all the  
5 essential elements of the crime charged beyond a  
6 reasonable doubt.  
7

8 We fragment the crime charge and list the  
9 essential elements of the crime charged. It is the  
10 Government's burden to prove all of those essential  
11 evidence.

12 Evidence is the method by which a disputed fact  
13 is proved or disproved. Evidence is generally classified  
14 as either direct evidence or as indirect or circumstan-  
15 tial evidence.

16 Direct evidence is the testimony of a witness  
17 as to what that witness saw or heard.

18 Circumstantial evidence is a method of proving  
19 or disproving a disputed fact by drawing reasonable  
20 inferences based on common sense and experience from  
21 established facts.

22 An example, and this is an example that I have  
23 used so often that it has become a part of me, and it  
24 demonstrates the difference between direct evidence  
25 and circumstantial evidence, is as follows:

1  
2 Let us assume you were sitting here as a jury  
3 in a personal injury case, and this is for the  
4 purpose of demonstrating the difference between  
5 direct evidence and circumstantial evidence--and  
6 a plaintiff came before you and claimed that the  
7 defendant on a particular day at a particular inter-  
8 section passed a stop sign without stopping and then  
9 struck her. Let us assume further that my courtroom  
10 deputy, Mr. Adler, and myself were standing at the  
11 particular intersection involved, and that he had  
12 his back to the roadway and the stop sign.

13 Now you must first identify the issue in dispute:

14 Plaintiff says the defendant passed the stop  
15 sign without stopping, the defendant says he did not:  
16 that is the disputed fact.

17 If I were called to the stand to testify I  
18 might testify that I was talking with Mr. Adler and  
19 through the corner of my eye the defendant's 1976  
20 white Cadillac came into view and was being driven  
21 at 65 miles an hour; that I saw it pass the stop  
22 sign and strike the plaintiff.

23 Thus if I gave evidence on that issue, the  
24 evidence I gave would be direct evidence. I would  
25 say that I saw a moving vehicle traveling at



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65 miles an hour pasts the stop sign without stopping.

My courtroom deputy who also was present but who had his back to the stop sign could not testify directly as to that disputed fact, but he might testify to circumstances from which the jury might reasonably find that the vehicle did pass the stop sign without stopping. He might say that while talking with me he saw the motor vehicle through the corner of his eye, that he saw it was a 1976 white Cadillac driving at 65 miles an hour, that he lost sight of it for, let us say, three or four seconds, and that after the car had traveled about one hundred and fifty feet, he, Mr. Adler, turned to his left and saw the car again and he saw it strike and knock down the plaintiff.

Well, there is proof that the moter vehicle passed the stop sign without stopping and that the circumstances were, on Mr. Adler's testimony alone, that the car traveled approximately one hundred and fifty feet in about three or four seconds.

I think your good common sense and experience would lead you to the reasonable inference that that motor vehicle had passed the stop sign without stopping.

The law does not hold one form of evidence is of better quality than the other. At

1  
2 times direct evidence is more reliable, and at times  
3 circumstantial evidence is more reliable. The law  
4 requires the Government to prove the guilt of the  
5 defendant on both the direct and circumstantial  
6 evidence.

7 What is the evidence in this case?

8 One, the sworn testimony of witnesses regardless  
9 of who may have called them;

10 Two. Exhibits received in evidence regardless  
11 of who may have produced them;

12 Three. Facts which may have been admitted or  
13 stipulated. I recall that the defendant stipulated  
14 that the Government's exhibit -- I do not know what  
15 the number of the cocaine is --

16 MS. AMON: Three, your Honor.

17 THE COURT: Three.

18 That if a chemist were called to testify that  
19 chemist would testify that the cocaine was a hundred  
20 and fifteen grams and had a purity of some thirty  
21 three and a third per cent.

22 MS. AMON: Your Honor, here is a copy of the  
23 stipulation.

24 (Document handed to the Court.)

25 THE COURT: All right.



1  
2 I recall it quite well.

3 Four. The facts which have been judicially  
4 noticed. For example, if I took judicial notice that  
5 May 15, 1970, was a Thursday, that would be a fact  
6 that the Court judicially noticed.

7 That is the evidence in the case, and the fair  
8 and reasonable inference you may draw from the  
9 established facts is the basis upon which you make  
10 your fact determination. In making your fact  
11 determination, you will determine the state of mind  
12 of the defendant.

13 In every crime charge, there are two major  
14 elements:

15 One is the proscribed act, that is the law says  
16 do not do this, and the other is criminal intent. The  
17 Government must prove both, first that the defendant  
18 or the accused knew and voluntarily and intentionally  
19 committed the act that was prohibited.

20 It is very difficult, if not impossible, to  
21 prove a state of mind, what an individual is thinking  
22 at the time, whether he had knowledge of what he was  
23 doing at the time by direct evidence. Usually it is  
24 the circumstances that would indicate whether or not  
25 the defendant, the accused, had criminal intent.

EK/ffe<sup>2</sup>  
2am/7

1  
2  
3 THE COURT: (continued) It is important in  
4 determining the evidence that you may consider in  
5 arriving at a verdict that you understand what is not  
6 evidence. Statements made by counsel in their openings  
7 and summations are not evidence. They serve a very  
8 useful function. As I indicated to you at the outset,  
9 the opening is designed to aid the jury in following  
10 the evidence that is to come. The summations are  
11 designed to present arguments based on the evidence,  
12 a theory of exculpability on behalf of the defendants,  
13 the defendants arguing that the Government failed to  
14 prove the guilt of the defendants; a theory of  
15 inculpability made by the Government, that is argument  
16 that the Government has proved the guilt of the  
17 defendants beyond a reasonable doubt. Again, they are  
18 a guide and an aid to the jury in dealing with the  
19 evidence.

20 You do not have to accept all the arguments.  
21 I think it would be quite impossible for you to accept  
22 all the arguments by both the Government and the  
23 defendants. Some may have seemed attractive to you,  
24 some may have sounded logical to you, it made sense,  
25 and if so, you may use it. Other that did not seem to  
be supported by the evidence or make any sense, well,



1  
2 just reject it. They are aids, but the important  
3 thing is that it is not evidence.

4 Any statements made by the Court is not  
5 evidence. I might say that you should not attach any  
6 special significance to questions put by the Court.  
7 There were times that the area might have seemed  
8 fudgy and I thought that a question might have clarified  
9 the evidence and so I asked the question. If it  
10 served that purpose, then I was successful, if it did  
11 not, then I failed. But the point is that it is no  
12 different than the lawyers asking a question.

13 At times an objection was sustained to a  
14 question that was asked. Now if the objection was  
15 sustained, you cannot speculate on what the answer  
16 might have been if the witness were permitted to  
17 answer, and that is on the same theory that if it is  
18 not in the record you cannot consider it.

19 The same is true when I directed that a matter  
20 be stricken from the record. As I directed it to  
21 physically be stricken from the record, so figuratively  
22 you must strike it from your mind and memory, it is  
23 not in the record.

24 At times a lawyer might have asked a question  
25 and he might have incorporated a fact which was not

1 supported by the record. If the witness said that it  
2 never happened, then you cannot assume that the fact  
3 it was incorporated in that question it were true or  
4 that it had a basis, because again there is no  
5 evidence in the record that the event occurred or that  
6 the relationship existed.  
7

8 I have used the term "inference" and "presumption."  
9 An inference is a conclusion which reason and common  
10 sense lead the jury to draw from the fact which have  
11 been established by the evidence in the case. An  
12 example of that, of course, is the method in proving  
13 or disapproving a disputed fact through circumstantial  
14 evidence.

15 A presumption, on the other hand, is a  
16 conclusion which the law requires a jury to make and  
17 continues only so long as it is not overcome or out-  
18 weighed by evidence in the case to the contrary. But,  
19 unless and until the presumption is so outweighed,  
20 the jury is bound to find in accordance with the  
21 presumption -- and the example of that, of course, is  
22 the presumption of innocence.

23 You, the jurors, are the sole judges of the  
24 credibility of the witnesses, which means the  
25 believability of their testimony and the weight their



1  
2 testimony deserves. Scrutinize the testimony and  
3 the circumstances under which each witness testified  
4 and every matter in evidence which tends to show  
5 whether a witness is worthy of belief.

6 Consider the witness' intelligence, consider  
7 his motive and state of mind.

8 Now Louis Rodriguez testified that he  
9 participated in the crime charged. You have the right  
10 to suspect the testimony of a participant in the  
11 crime charged if you find that he has a personal stake  
12 in the outcome of the trial, or if you find that he  
13 believes the rewards promised depend on the outcome  
14 of the trial. Rodriguez is not incompetent to testify  
15 because of his participation in the crime charged.  
16 On the contrary, the testimony of Rodriguez alone, if  
17 believed by the jury to be true beyond a reasonable  
18 doubt, may be of sufficient weight to sustain a verdict  
19 of guilty, even though not corroborated or supported  
20 by other evidence in the case. The jury should keep  
21 in mind that the testimony of an accomplice is always  
22 to be received with caution and weighed with great  
23 care. You should never convict a defendant on the  
24 uncorroborated testimony of a participant or one who  
25 says he is a participant unless you believe that

1 testimony to be true beyond a reasonable doubt.

2 The testimony of a witness who provides  
3 evidence against a defendant for pay, or for immunity  
4 from punishment, or for personal advantage must be  
5 examined and weighed by the jury with greater care  
6 than the testimony of an ordinary witness. The jury  
7 must determine whether the informant's testimony has  
8 been affected by interest, or by prejudice against the  
9 defendant.  
10

11 Special Agent Vince Guadaguino testified that  
12 sometime in 1969, he entered into negotiations with  
13 the defendant, Esparza, initially through a third party,  
14 and finally, directly with Esparza for the purchase of  
15 about twenty five grams of heroin. This evidence does  
16 not concern either of the other defendants, and you  
17 may not charge it against him. It is offered for  
18 limited use.

19 You must understand that a defendant is called  
20 upon to defend only the charge in the indictment, and  
21 I will read that charge soon.

22 If you will refer to your Memorandum of Verdict,  
23 you will see that the indictment relates to a  
24 conspiracy charge on or about and between May 16, 1975  
25 and May 31, 1975, and that the substantive charges

1  
2 relate to what occurred on May 29, 1975. Armando  
3 Esparza is not charged with what happened, if you  
4 believe the testimony, in 1969. It may be used, if  
5 the evidence is credited, to identify the defendant  
6 Esparza as the person who participated in the crime  
7 charged in this indictment.  
8

9 (Continued on next page)  
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2 EK/ffe  
3 2am/8

THE COURT: (Continued) It may also be used  
on the question of criminal intent, and even, if you  
find that, that Esparza committed the acts that he is  
charged with committing. Suppose you find that he was  
at the Tollgate Bar on May 29, 1975 -- and I think Mr.  
Laifer conceded, if I am correct, that he was there,  
and if you find that Mr. Gonzalez came into the car  
with money, then in all of those circumstances you  
must ask yourselves has the Government proved criminal  
intent. If you find, on the other hand, that Gonzalez  
was involved in a drug transaction, for example, then  
the question is whether Esparza was aware of what was  
going on. You may use the evidence of a prior crime,  
if you find it is similar to the transaction here, to  
determine whether he was aware of what was going on  
on the 29th. That is the limited use. But you must  
keep in mind that you cannot find him guilty for the  
crime charged if the evidence is not there just  
because you believe that he committed a crime in 1969.

I also charge you at the time the evidence  
came in of conversations between Rodriguez -- and I  
believe Agent Alleva was allegedly present -- on  
April 21st, 23rd and 24th with Mr. Christian. Now  
the charge is that the conspiracy commenced on or

1 about May 16, 1975. The Government may show that the  
2 conspiracy started a reasonable time before then. Now  
3 you determine under all the circumstances what a  
4 reasonable time is. If you find that April 21st, 23rd  
5 and 24th was a reasonable time before May 16th --  
6 and that looks like about twenty five days before  
7 May 16th -- then you may consider that this was a  
8 conversation that comes within the time period charged.  
9 But suppose you find, Oh, no, that was too early, the  
10 Government charges May 16th or on or about May 16th,  
11 that is too early for that charge, then you may  
12 consider those conversations, if you believe the  
13 testimony to be true, only again the defendant  
14 Hector Christian -- and again it is on the question  
15 of whether the man who had those conversations on the  
16 21st or the 23rd or the 24th would be aware of a  
17 narcotic transaction that was discussed on May 15th  
18 or May 16th, and that is if you would believe that  
19 testimony, too. I am not passing on the credibility,  
20 mind you, that is your job, I just want to give you  
21 an example of how to treat the evidence and the  
22 limited use of some of the evidence. So it would  
23 just be for the purpose of determining whether Mr.  
24 Christian entered into the conspiracy on May 16th or  
25



1  
2 about May 16th, and in that event it would not be  
3 chargeable against any of the other defendants.

4 Now Rodriguez testified that in May of 1975,  
5 he had a conversation at the Tinita's Bar with the  
6 defendant Christian. The evidence is that they  
7 negotiated a deal for the delivery of one eighth of a  
8 kilo of cocaine. I think the testimony was that they  
9 had the conversation on the fifteenth and the deal was  
10 supposed to take place the next day. This was at a  
11 time before Rodriguez was arrested and had become a  
12 Government informer. Rodriguez testified that he  
13 contacted Special Agent Alleva who he believed to be  
14 a prospective purchaser of the cocaine. Both Alleva  
15 and Rodriguez testified that they met the defendant  
16 Christian at the Tinita's Bar on May 16, 1975, for the  
17 purpose of consummating the sale of the cocaine. The  
18 sale was never consummated. If you are convinced by  
19 the testimony in the case that Christian never  
20 discussed the sale of cocaine, or, conversely, that  
21 the Government failed to prove beyond a reasonable  
22 doubt that Christian negotiated for the sale of the  
23 cocaine, then you must find the defendant Christian  
24 not guilty of Count one on the conspiracy count.

25 On the other hand, if you find that the



1  
2 conspiracy charged in the indictment was established  
3 for the purpose alleged in the indictment, and the  
4 indictment says to deal in cocaine, and if you find  
5 that the defenant Hector Christian knowingly and  
6 wilfully entered into the conspiracy, that he became  
7 a member of it, and that thereafter one of the members  
8 of the conspiracy committed an overt act knowingly and  
9 in furtherance of the conspiracy, which in effect means  
10 that somebody did something to promote the cocaine  
11 deal, then Christian may be held and found guilty of  
12 the conspiracy charge even though he was not connected  
13 with the transaction of May 29th and even though the  
14 evidence fails to show that he knew Esparza -- and I  
15 will go into that later in the charge.

16 I point this out because one interpretation of  
17 the argument as I heard it was that the Government  
18 failed to prove a conspiracy against the defendant  
19 Hector Christian if it failed to connect him with the  
20 transaction that occurred thirteen days later, on the  
21 twenty ninth. It is not true because the mere fact  
22 that a sale was not consummated on the sixteenth, if  
23 you believe that is what transpired, is not fatal to  
24 the Government's case. The theory of conspiracy is  
25 that the crime is the agreement, the entering into the

1 understanding to commit an unlawful act and the  
2 commission of an overt act knowingly done in furtherance  
3 of the conspiracy. An overt act might be anything,  
4 it might be a telephone call to negotiate the deal,  
5 anything that will promote the deal. It might be  
6 bringing someone to the place, knowing that the  
7 transportation was for the purpose of negotiating the  
8 cocaine deal. Again, it has to be knowingly done and  
9 in furtherance of the conspiracy. The overt act in  
10 itself might be perfectly lawful. The test is as to  
11 whether it is the kind of an act that would further  
12 the conspiracy, and the crime is whether it was  
13 knowingly done, in other words whether the party who  
14 does it knows that he is helping along the cocaine  
15 transaction and whether it is done for the purpose  
16 of promoting the transaction, helping to complete the  
17 deal. The fact that it was a failure is of no  
18 consequence. It is not true in the two substantive  
19 crimes, there if someone is charged with the possession  
20 with intent to distribute or charged with distributing,  
21 there the Government must prove the crime was completed.  
22 That is the difference between a substantive crime and  
23 a conspiracy to commit the crime.  
24

25 (Continued next page)



## Charge

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1  
2 THE COURT: The defendant Delfin Leo  
3 Gonzalez testified that on May 29, 1975, he  
4 delivered a package which contained cocaine to  
5 Special Agent Alleva at the request of Luis  
6 Rodriguez, who was then an agent of the govern-  
7 ment. Now Rodriguez was arrested on May 22nd, I  
8 think that is what the evidence is -- and again the  
9 fact determination is always in your hands. Now  
10 you must distinguish between his activity before  
11 the time of arrest and at the time of arrest. At  
12 the time of arrest, when he was arrested, as a  
13 matter of law he withdrew from the conspiracy, he  
14 was no longer a partner in that conspiracy, if you  
15 believe that there was such a conspiracy. Now  
16 whatever he said or did prior to May 21st may bind  
17 everyone else that you find to be a member of the  
18 partnership, the conspiracy as I will charge it  
19 later, but from the moment of arrest on he cannot  
20 speak for anyone but himself, and when he became  
21 a government agent his role became different.

22 If you believe the testimony given by  
23 Gonzalez that he delivered the package only  
24 because Luise Rodriguez told him to do it, that  
25 he was getting \$200 for it, then he was acting at



1  
2 the direction of a government agent -- that is  
3 the significant part of it. If that is what  
4 happened, then Gonzalez did not commit a crime  
5 in delivering the package, that is if he had no  
6 previous intent or purpose to violate the law in  
7 delivering the cocaine but was induced or persuaded  
8 by Rodriguez to commit the crime. On the other  
9 hand, if Gonzalez without the inducement or  
10 persuasion of government agents, and on his own  
11 initiative was ready and willing to deal in cocaine,  
12 delivered this package knowing that it was cocaine,  
13 the mere fact that Rodriguez and/or Alleva provided  
14 the opportunity to engage in the sale of the  
15 cocaine does not afford Gonzalez a defense to the  
16 charge.

17 If a witness is shown knowingly to have  
18 testified falsely concerning any material matter,  
19 you have a right to distrust that witness'  
20 testimony in other particulars: You have the  
21 right to reject all that witness' testimony on  
22 the ground that that witness is unworthy of belief.  
23 On the other hand, you also have the right to  
24 accept so much of that witness' testimony as you  
25 believe is true. The principle simple underscores

1  
2 the broad discretion that the jury has in weighing  
3 testimony and credibility of witnesses.

4 A defendant who wishes to testify is  
5 competent as a witness. You must judge his  
6 testimony in the same manner as any other witness.  
7 Take into consideration his intelligence, his  
8 motive for testifying, his demeanor and manner  
9 while on the witness stand -- this is of all  
10 witnesses -- how do they strike you, do they  
11 strike you as answering fully and frankly or do  
12 they strike you as evasive. Take into  
13 consideration the witness' own ability to observe  
14 the matters as to which he has testified -- whether  
15 he shall have impressed you of having an accurate  
16 recollection of those matters. Take into  
17 consideration the relation each witness might bear  
18 to either side of the case. Take into consideration  
19 the manner in which each witness might be affected  
20 by the verdict and the extent to which, if any,  
21 each witness is either supported or contradicted  
22 by other evidence in the case.

23 As to Esparza and Hector Christian, they  
24 are not required to take the stand. The law does  
25 not compel a defendant in a criminal case to take



1  
2 the witness stand and testify. No presumption of  
3 guilt may be raised and no unfavorable inference  
4 of any kind may be drawn in the failure of a  
5 defendant to testify. A defendant, as previously  
6 charged, may rely on the failure of the government  
7 to prove its case. It would be improper for you to  
8 discuss the failure of a defendant to testify  
9 during your deliberations.

10 Now turning to the charge in this case,  
11 Count 1 charges -- and incidentally, again, the  
12 indictment is not proof of the charges in the  
13 indictment, as I told you at the outset the  
14 government's proof must come from the mouths of  
15 witnesses and the exhibits, and again the  
16 defendants, all the defendants have said not  
17 guilty to all the charges.

18 Count 1 reads as follows:

19 "On or about and between the 16th day of  
20 May, 1975 and the 31st day of May, 1975, both  
21 dates being approximate and inclusive, within the  
22 Eastern District of New York, the defendants  
23 Armando Esparza, Delfin "Leo" Gonzalez and  
24 Hector Christian did knowingly, willfully and  
25 unlawfully combine, conspire, confederate and



1  
2 agree together and with each other to knowingly  
3 and intentionally distribute a quantity of  
4 cocaine, a Schedule II narcotic drug controlled  
5 substance in violation of Section 841(a)(1) of  
6 Title 21, United States Code."

7 Title 21, United States Code, Section 846,  
8 and this is the conspiracy charge, that these  
9 three individuals "did knowingly, willfully and  
10 unlawfully combine, conspire, confederate and  
11 agree," and the charge is that they conspired, and  
12 it is the conspiracy itself, the agreement to, the  
13 understanding to violate the law that is charged.

14 The other two counts, as I say, refer to  
15 the one transaction, one is the possession with  
16 intent to distribute and the other is the  
17 distribution.

18 Count 2 charges, and only charges Esparza  
19 and Gonzalez:

20 "On or about the 29th day of May, 1975,  
21 within the Eastern District of New York, the  
22 defendants Armando Esparza and Delfin "Leo"  
23 Gonzalez, did knowingly and intentionally possess  
24 with intent to distribute approximately 115 grams  
25 of cocaine, a Schedule II narcotic drug controlled

substance."

Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.

Count 3 charges the distribution:

"On or about the 29th day of May, 1975, within the Eastern District of New York, the defendants Armando Esparza and Delfin "Leo" Gonzalez, did knowingly and intentionally distribute approximately 115 grams of cocaine, a Schedule II narcotic drug controlled substance."

That is Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.

Now turning to the statute upon which this is based. You must understand that Congress defines what is a crime, Congress says you may not do this, and on May 1, 1971 the Drug Abuse and Control Act of 1970 became effective.

Under that law, Congress closely supervised the manufacture, importation, transportation, possession, sale and distribution of all narcotic drugs. It organized or set out a schedule of different drugs, and under Section 812 of Title 21, under Schedule II, it held:



1  
2 "The drug or other substance has a high  
3 potential for abuse.

4 "The drug or other substance has a  
5 currently accepted medical use in treatment in  
6 the United States or a currently accepted medical  
7 use with severe restrictions.

8 "Abuse of the drug or other substances may  
9 lead to severe psychological or physical  
10 dependence."

11 Under Schedule II it lists, "Coca leaves  
12 and any source, compound, derivative, or  
13 preparation of coca leaves, and any source,  
14 compound, derivative, or preparation thereof" of  
15 coca leaves and I charge you that cocaine is a  
16 derivative of coca leaves and that was the way it  
17 was classified.

18 Then the statute went on to say what was  
19 unlawful, and I will read you the pertinent part  
20 of the section, Section 841(a)(1), which I cited,  
21 and it says in part:

22 "It shall be unlawful for any person  
23 knowingly or intentionally --

24 "To distribute or possess with intent to  
25 distribute a controlled substance."



1  
2 In language as brief as that it makes the  
3 possession with intent to distribute and the  
4 distribution of cocaine a crime.

5 Then under Section 846, it says that anyone  
6 who conspires to commit these acts commits the  
7 crime of conspiracy in this brief language:

8 Any person who conspires to commit any  
9 offense defined in this subchapter commits the  
10 crime.

11 A conspiracy is a combination of two or  
12 more persons, by concerted action, to accomplish  
13 some unlawful purpose, or to accomplish some  
14 lawful purpose by unlawful means. So, a conspiracy  
15 is a kind of "partnership in criminal purposes,"  
16 in which each member becomes the agent of every  
17 other member. The partners in a conspiracy are  
18 known as conspirators. The gist of the offense  
19 is the combination, the getting together, to  
20 commit the crime.

21 The mere similarity of conduct among  
22 various persons, and the fact that they may have  
23 associated together similarly and may have  
24 assembled to discuss common interests, does not  
25 necessarily establish proof of the existence of

1  
2 the conspiracy. However, the evidence in the  
3 case need not show that the members entered into  
4 any express or formal agreement, or that they  
5 directly, by words spoken or in writing, stated  
6 between themselves what their object or purpose  
7 was to be, or the details thereof, or the means  
8 by which the object or purpose was to be  
9 accomplished. What the evidence in the case must  
10 show beyond a reasonable doubt, in order to  
11 establish proof that a conspiracy existed, is that  
12 the members in some way, or manner, or through  
13 some contrivance, positively or tacitly came to a  
14 mutual understanding to try to accomplish a  
15 common and unlawful plan.

16 In this case, the charge is that the  
17 parties got together to deal in cocaine.

18 Now one may become a member of a conspiracy  
19 without full knowledge of all the details of the  
20 conspiracy. One may become a member of the  
21 conspiracy without knowing all the other members  
22 of the conspiracy.

23 (Continued next page.)  
24  
25



1  
2 THE COURT: (Continuing.) Before you may  
3 find any accused a member of the conspiracy, the  
4 evidence must show beyond a reasonable doubt that  
5 the conspiracy was knowingly formed; that the  
6 parties were aware of what they were doing, that  
7 it was't by accident, inadvertence or any other  
8 innocent reason; that they got together to deal in  
9 cocaine; and that the defendant or any other person  
10 who is claimed to be a member willfully participated  
11 in the unlawful plan with intent to advance the  
12 purposes of the plan, in other words that the member  
13 voluntarily and intentionally participated and did  
14 what he did knowing that he was dealing in cocaine.  
15

16 In determining whether or not an accused  
17 entered into the conspiracy, you may only consider  
18 testimony of what that particular accused said or  
19 did.  
20

21 I charged you on statements or acts by other  
22 alleged members of the conspiracy when one or more  
23 of the defendants were not present--and this is a  
24 matter of dealing with the evidence and I will come  
25 to that soon. We are talking about dealing  
with evidence that would indicate whether or not



1  
2 a defendant was participating in this scheme to  
3 deal in cocaine. There you may only use the testimony  
4 of witnesses as to what that particular accused  
5 said or did. For example, if Mr. Alleva testified  
6 that Mr. X told him something in dealing in narcotics,  
7 if you find that--did I say Mr. Alleva, I meant  
8 Mr. Rodriguez, if I said Mr. Alleva I made a mistake--  
9 if Mr. Rodriguez testified that Mr. X told him  
10 something or that he said or did something, and  
11 let us assume that you find that Mr. Rodriguez  
12 was a member of the conspiracy--and incidentally,  
13 before you may bind any of the defendants with  
14 what Mr. Rodriguez said or did before May 22nd,  
15 the government must first prove to you that he  
16 knowingly and willfully became a member of the  
17 conspiracy -- then that testimony concerning that  
18 transaction or that conversation cannot be used  
19 to determine whether the other accused entered into  
20 the conspiracy. Here is where in order to impose  
21 criminal liability it must be by the act of or the  
22 statement by the individual charged.  
23  
24  
25

1  
2 What Mr. Alleva or Mr. Rodriguez said he saw any  
3 of the accused do or the conversation either of them  
4 had with the accused is for you to consider in  
5 determining whether the particular accused entered  
6 into the conspiracy.

7 While I talk about conspiracy and the roles  
8 that people play, I think it might be instructive  
9 if I talked a moment about differences between  
10 partners, as the layman usually understands them,  
11 and the type of conspiracy charged in this  
12 indictment. It isn't necessary for the government  
13 to prove that all the partners were equal partners  
14 or whether they shared or if they got anything;  
15 the fact that they received no monetary benefit  
16 out of the conspiracy is quite immaterial. In a  
17 conspiracy as charged in this indictment, very  
18 often the various participants in the conspiracy  
19 play different roles. The charge here is that  
20 Mr. Esparza was the source, that Mr. Gonzalez was  
21 the deliveryman and that Mr. Christian was a  
22 broker of some kind, or a mailman, if you will;  
23 and similarly, while he was a member of the  
24 conspiracy that Mr. Rodriguez  
25



1 acted in a similar capacity as a middle man.

2 The mere fact that I recite this as the  
3 government's position doesn't mean that I am  
4 passing on the validity of that position. I am  
5 just giving you that as an example, and I won't  
6 be able to intelligently charge you on the type  
7 of conspiracy this is unless you are aware of  
8 the government's position -- and again I say  
9 the defendants deny that they ever participated  
10 in the conspiracy.  
11

12 But the roles are different. We call this  
13 a chain conspiracy, and that means that different  
14 people occupy different positions. It is necessary  
15 for the government to prove that a conspiracy  
16 existed and it is necessary to recognize that each  
17 defendant may have played a different role, even  
18 though it isn't necessary for the government to  
19 identify every party in the conspiracy, it is  
20 necessary for the government to prove that the  
21 participants to be charged knew that there were  
22 others in the conspiracy dealing in cocaine and  
23 helping the business along.

24 Now we come to a different principle.

25 When I charge you during the trial I told you that



1  
2 at times acts and declarations of members of the  
3 conspiracy bind other members of the conspiracy.

4 First there is the principle of criminal  
5 liability, that is the accused are in the conspiracy  
6 if you find that is shown; then the acts and  
7 declarations of any other members of the conspiracy  
8 are binding on the accused whom you find knowingly  
9 and willfully entered into the conspiracy, that is if  
10 you find that the acts and declarations were made  
11 during the term of the conspiracy and were to  
12 advance the purposes of the conspiracy. I told you  
13 to disregard those acts and declarations if they  
14 weren't made by members of the conspiracy and were  
15 q] out of the presence of the defendants, or if they  
16 were made at the time that came before or after  
17 the conspiracy terminated. As to Mr. Rodriguez, of  
18 course his statements, the statements made by him  
19 as to events occurring after his arrest on May 22, 1975  
20 cannot bind anyone whom you find to be a member of  
21 the conspiracy.

22 So first determine whether or not the  
23 conspiracy existed as alleged in the indictment.  
24 If you conclude that the conspiracy was knowingly  
25

1  
2 formed, then you should determine next whether  
3 the accused knowingly and willfully became a  
4 member of the conspiracy. If it appears beyond  
5 a reasonable doubt from the evidence in the case  
6 that the conspiracy in the indictment was  
7 knowingly and willfully formed, that the accused  
8 knowingly and willfully became a member of the  
9 conspiracy and thereafter one or more of the  
10 conspirators knowingly committed an overt act in  
11 furtherance of the purpose of the conspiracy,  
12 then the success or failure of the conspiracy to  
13 accomplish the common object or purpose is  
14 immaterial.

15 Again, an overt act is anything done or  
16 said that could be seen or heard; it is knowingly  
17 done when the party who does it is aware that it  
18 is for the purpose of the conspiracy to deal in  
19 cocaine, and it is willfully done when it is done  
20 voluntarily and intentionally and not by pure  
21 accident.

22 So the government must prove four essential  
23 elements of the crime charged in order to establish  
24 Count 1:

25 First, that the conspiracy described in the



1  
2 indictment was willfully formed for the purposes  
3 alleged at the time or about the time alleged in  
4 the conspiracy;

5 Second, that the accused willfully became  
6 a member of the conspiracy, and I have charged  
7 you on the type of evidence that you may consider  
8 to make that determination.

9 Three, that one of the conspirators  
10 thereafter knowingly committed an overt act;

11 And, four, that such overt act was knowingly  
12 performed in pursuance of the objectives or objects  
13 of the conspiracy.

14 Now we turn to Count 2:

15 In order to establish the crime of  
16 possession with intent to distribute, the  
17 government must prove beyond a reasonable doubt  
18 that the accused, and the accused here are  
19 Mr. Gonzalez and Mr. Esparza, possessed the  
20 cocaine.

21 Now possession can be actual or constructive.  
22 If I hold these glasses in my hand, I have what we  
23 call dominion and control. I can give them away,  
24 I can destroy them, I can sell them. That is  
25 actual possession.



1  
2 On the other hand, if my glasses were in  
3 my chambers and I asked my Court Deputy to get  
4 them for me, it would be constructive possession  
5 because even though not actually in my possession,  
6 not under my direct dominion and control, I have  
7 the power to do with them what I wish.

8 Possession may also be joint or sole. When  
9 I possess these, (indication) I have these, these  
10 are my glasses. One who is a partner may have an  
11 interest in something that I have, he may have the  
12 right to do what he wants with it, that is to  
13 dominate and control it. It is possible for one to  
14 have two partners or one to have three partners  
15 or one to even have four partners and one would  
16 have actual possession and the others would have  
17 constructive possession; one would have it solely  
18 in his possession but hold it for the benefit of  
19 others.

20 The government may prove possession of the  
21 cocaine on May 29th by proving either actual or  
22 constructive possession, either sole or joint.  
23 That is one of the essential elements.

24 The second, that such possession was  
25 knowing or intentional, in other words that the

1 parties in possession were aware that it was cocaine  
2 and that they did not possess it accidentally, that is  
3 that they intended to possess it.  
4

5 The third, essential element is that such  
6 possession was with intent to distribute, that it  
7 wasn't solely for the persons use but that they  
8 intended to sell it or otherwise dispose of it.

9 As to count 3, the government must prove that  
10 on May 29, 1975 the accused knowingly and intentionally  
11 distributed the 115 grams. The first essential  
12 element the government must prove is that the  
13 accused distributed 115 grams or approximately 115  
14 grams on May 29th. The second essential element is  
15 that it was knowing and intentional, in other words  
16 that the party distributing it knew it was cocaine and  
17 did it voluntarily and intentionally.

18 (Continued next page.)  
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2 THE COURT: (Continuing.) Now, if you believe  
3 the testimony offered by the government that there  
4 is proof that Gonzalez actually had the cocaine in  
5 hand and that he sold the cocaine to Special Agent  
6 Alleva, and that there is no such direct proof as  
7 against the defendant Espartaco, and where two or more  
8 persons are charged with the commission of the crime--  
9 I'm talking only about the delivery alleged to have  
10 taken place on May 29th -- then the guilt of the  
11 defendant may be established without proof that he  
12 personally did every act in the manner constituting  
13 the offense charged.

14 Section 2 of Title 18, which was cited in one  
15 of the counts, says:

16 "Whoever commits an offense against the  
17 United States or aids, abets, counsels, commands,  
18 induces, or procures its commission, is punishable  
19 as a principal."

20 "Whoever willfully causes an act to be done,  
21 which if directly performed by him or another  
22 would be an offense against the United States,  
23 is punishable as a principal."  
24  
25



1  
2 In other words, every person who willfully  
3 participates in the commission of a crime may be  
4 found guilty of that offense. Participation,  
5 again, is willful if the act of participation is  
6 done voluntarily and intentionally and with  
7 specific intent to violate the law.

8 In order to aid and abet another to commit  
9 a crime, it is necessary that the accused  
10 willfully associate himself in some way with the  
11 criminal venture, and willfully participate in it  
12 as he would in something he wishes to bring about;  
13 that is to say, that he willfully seeks by some  
14 act or omission of his to make the criminal  
15 venture succeed.

16 You will be shortly excused for deliberation  
17 on the matter before you.

18 Your verdict must be unanimous, each juror  
19 must decide the case for himself or herself. But  
20 the jury process is a deliberative process, it is  
21 an exchange of ideas.

22 In dealing with the evidence, you may  
23 tentatively arrive at some verdict; then, after  
24 discussing the evidence with your fellow jurors,  
25 you may decide that that tentative verdict was

1  
2 not a proper one based on the evidence. If you  
3 find that your first determination was improper  
4 and that you would arrive at a different verdict,  
5 based on the evidence, of course it is perfectly  
6 proper for you to do that.

7 What is not proper is for a juror to take  
8 a position on the one hand of not wanting to  
9 discuss the case, coming to a verdict or  
10 determination without wanting to discuss the  
11 evidence with their fellow jurors, or, on the  
12 other hand, abandoning their participation and  
13 agreeing to go along.

14 The parties are entitled to a unanimous  
15 verdict of twelve jurors, in other words twelve  
16 jurors arriving at the same verdict.

17 During your deliberations, you may have  
18 reason to communicate with the Court. You will  
19 do that through your foreman.

20 If you want to hear any testimony, just  
21 try to identify the subject matter and the  
22 witness and I will bring the jurors into Court  
23 and read it back to them.

24 Nothing is done without consultation with  
25 the lawyers. If you send me a note, I talk to the



1  
2 lawyers, I try to determine from the note what  
3 you want read or what other information you want.

4 Make certain that the note comes from the  
5 foreman.

6 The same thing goes if you want the exhibits,  
7 ask for them. I won't send any exhibits in unless  
8 you ask for them. If you want them all, just say,  
9 All the exhibits.

10 During your deliberations, don't tell me  
11 how you stand at any time. When you have arrived  
12 at a verdict, then send me a note and say, We have  
13 a verdict. Don't tell me what the verdict is.  
14 When I get that note I call the jury in, I ask  
15 the foreman to stand, and I ask him what the verdict  
16 is.

17 In effect I say, United States of America  
18 against Armando Esparza, Delfin "Leo" Gonzalez and  
19 Hector Christian, how do you find the defendant  
20 Armando Esparza as to Count 1. And you will give  
21 me the answer. Then, how do you find the  
22 defendant Delfin "Leo" Gonzalez as to Count 1, and  
23 Hector Christian, and then when you give me all the  
24 verdicts, the foreman sits down and I then turn  
25 to Juror Number 2 and say in effect: You have



1  
2 heard the verdict, is that your verdict? And  
3 you will answer it and I will go right through  
4 to the twelve jurors and when all twelve jurors  
5 in open Court announce the verdict, then it  
6 becomes the verdict of this case.

7 Now if you will take leave of the Court,  
8 and don't start your deliberations yet, I must  
9 talk to the lawyers first, I will then call you  
10 into the Courtroom shortly.

11 You may now leave.

12 (At 1:00 o'clock p.m. the jury left the  
13 Courtroom.)

14 (Continued next page.)  
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ek/ss  
2aml2

1 THE COURT: Are there any exceptions?

2 MRS. AMON: No, your Honor, but there is  
3 one thing, I am sorry, I may have missed it, I  
4 don't recall whether you charged what we dis-  
5 cussed previously about Mr. Gonzalez's involvement  
6 on the 16th that he would be guilty of the  
7 conspiracy even if the sale didn't take place.

8 THE COURT: I said that.

9 MRS. AMON: I am sorry, I wasn't sure.

10 THE COURT: I covered that.

11 Anything, Mr. Laifer.

12 MR. LAIFER: One or two things, Judge.

13 When your Honor gave a description of an  
14 overt act you indicated that it might be bringing  
15 somebody to a place, and of course that is directly  
16 related to the testimony in this case.

17 I would just ask your Honor would you  
18 instruct the jury that it is their determination  
19 whether or not bringing somebody, that is Esparza  
20 bringing Gonzalez down there would constitute an  
21 overt act.

22 Additionally, your Honor, would you also  
23 instruct that aiding and abetting must be  
24 established beyond a reasonable doubt.

25 THE COURT: Wait a minute.



1 MR. LAIFER: I am sorry, your Honor.

2 THE COURT: Yes?

3 MR. LAIFER: Additionally, sir, would you  
4 also instruct that Section 2 of Title 18 must be  
5 established beyond a reasonable doubt, the aiding  
6 and abetting must be established beyond a reason-  
7 able doubt.

8 THE COURT: Didn't I say that.

9 MR. LAIFER: No, your Honor.

10 MR. ASENS: No.

11 MR. BELVEDERE: No, your Honor.

12 THE COURT: All right.

13 MR. LAIFER: Additionally, your Honor, I  
14 don't know whether your Honor had my request to  
15 charge, but you indicated you would charge  
16 request number 3, request number 4 and request  
17 number 6, and that really I don't believe your  
18 Honor did.

19 THE COURT: I charged that mere similarity  
20 of conduct -- I charged 3, 4 -- what else?

21 MR. LAIFER: Number 6, your Honor, mere  
22 presence, mere association.

23 THE COURT: I don't know whether I said  
24 association.

25 MR. LAIFER: Even knowledge, this is the



1 direct language in Terrul from this circuit.

2 THE COURT: I know I charged because I  
3 almost read that part from the charge, mere  
4 association, mere getting together.

5 MR. LAIFER: Even knowledge, and you  
6 didn't say that most respectfully, specifically  
7 knowing means that a man can know and can be  
8 present and yet no crime is being committed.

9 THE COURT: Okay.

10 MR. LAIFER: Also, your Honor, the last  
11 thing, the last thing which I called your Honor's  
12 attention and your Honor agreed, that is as to the  
13 order of the defendants, their appearance on the  
14 indictment, that that has no bearing.

15 That is all that I have.

16 MR. ASENS: I have two things, your Honor.

17 THE COURT: Go ahead.

18 MR. ASENS: When your Honor charged on  
19 entrapment, your Honor next charge immediately  
20 following that which was based on the testimony  
21 of my client was the charge on believability or  
22 lack of believability of witnesses or whether a  
23 witness has testified truthfully, and I would  
24 object to the placement of that charge following  
25 so closely after the charge on entrapment and my

1 client's testimony, and I would ask your Honor  
2 that your Honor charge the same charge on  
3 believability for Mr. Rodriguez and the  
4 government agent who also testified in this case.

5 MRS. AMON: That statement was made  
6 directly at that time.

7 MR. ASENS: I think it is somewhat  
8 prejudicial to charge on whether if you choose  
9 to believe or believe a witness has lied then to  
10 charge immediately, and that only after one  
11 witness is charged.

12 THE COURT: Well, let me understand --

13 MR. ASENS: You didn't put in the right  
14 place two things, one that it followed so closely  
15 the entrapment charge and tended to cause some  
16 doubt as to the efficacy of the entrapment  
17 defense, and, number two, it applies to all  
18 witnesses who testify in this case and no  
19 witness is greater --

20 THE COURT: What is next.

21 MR. ASENS: I would take exception to your  
22 Honor's reading of Title 21 in regard to the  
23 classification of cocaine, and I believe your  
24 Honor made reference to its high potential for  
25 abuse.



1 THE COURT: Yes.

2 MR. ASENS: And I think that is what I take  
3 exception to, to the reading of that to the jury.

4 THE COURT: Yes.

5 MR. ASENS: It is not a part of the  
6 statute as it applies to the elements of the  
7 crime.

8 THE COURT: I disagree with you.

9 MR. LAIFER: I respectfully join in that.

10 MR. ASENS: I believe that is the only  
11 argument that I have.

12 THE COURT: Anything else.

13 MR. ASENS: No, I have nothing further.

14 THE COURT: Mr. Belvedere.

15 MR. BELVEDERE: No.

16 THE COURT: All right, call the jury in.

17 If I should not have read it, and it also  
18 has a medical purpose also --

19 MR. ASENS: I didn't hear your Honor.

20 THE COURT: You didn't hear me say that  
21 the classification is based -- that it has some  
22 medical purpose too.

23 MR. ASENS: Except I recall at the  
24 beginning of the trial your Honor instructed the  
25 jury that cocaine was not an addictive drug.



1 THE COURT: I didn't think of that but  
2 that was a very good reason for reading it.

3 I am happy now that I read it because  
4 that was at the beginning of the trial.

5 Incidentally, I think I've done this in  
6 every drug abuse and control act charge, I read  
7 the classification, what it means.

8 I don't have time to discuss it with you,  
9 but let me say that there was more reason to read  
10 it here than in any other trial that I have had.

11 Seat the jury.

12 (At 1:10 p.m. the jury took its place in  
13 the jury box.)

14 THE COURT: When I described what an overt  
15 act was by example I said that an overt act can  
16 mean transporting someone for a narcotic deal,  
17 I did not mean to make any determination  
18 whatsoever that Esparza brought Gonzalez to the  
19 Tollgate Bar or determine that that was an overt  
20 act. I was just in general talking about possible  
21 overt acts and I gave you some examples of an  
22 overt act, but of course that is solely for your  
23 determination, I have nothing to do with that.

24 When I discussed the aiding and abetting  
25 statute, that the government must prove that there

1 was participation in whatever overt act was  
2 committed or claimed to have been committed by  
3 the government, that is to aid and abet the  
4 commission of the substantive crime, and that  
5 it is to be proved by proof beyond a reasonable  
6 doubt I thought I charged that mere presence or  
7 association among persons is not enough to  
8 establish a conspiracy. Of course, even if it  
9 is shown that an individual knew that conspiratorial  
10 activities were going on, that is not enough, it  
11 must be shown that he participated in it, that he  
12 did something knowingly and willfully before  
13 you can establish one's entry into the conspiracy.

14 Now the indictment charges multiple  
15 defendants in some order, but the defendants are  
16 not charged in any order of culpability or  
17 degree of culpability. It might very well be  
18 that -- well, I thought I might say that they  
19 are almost in alphabetical order, but they are  
20 just haphazardly listed, and that is all there is  
21 to it, it should not indicate to you that anyone  
22 believes, whether the government or anyone else,  
23 believes that one is more culpable than the other.  
24 Culpability is not a consideration for you. You  
25 will just determine whether the accused entered



into the conspiracy, whatever their role is, whether it is minor or major, that is not for you. You just determine whether they were a part of it.

Shall I excuse the jury again for anything further?

MR. LAIFER: I have nothing.

MRS. AMON: Nothing.

THE COURT: No?

All right.

Alternate Number 1 is excused.

I assume your lunch has already been received, you can pick it up in my chambers. You cannot deliberate on the matter.

THE CLERK: Will you just pick up your things in the jury room and go right into the Judge's chambers.

THE COURT: Please swear in the Marshals.

(The Marshals were then duly sworn.)

THE COURT: My luncheon today was to have been a luncheon meeting over in New York among judges considering certain problems. I was supposed to be there at a quarter to 1:00 and that is why I appear to be in a bit of a hurry.

I may be delayed in getting back, I hope



1 to get back by 2:30.

2 If you send a note through the marshals,  
3 it won't get to me until about 2:15 or 2:30.

4 Don't be concerned about the delay, it is  
5 not because I have forgotten about you, it is just  
6 because I may not be back yet.

7 The jury is now to deliberate the matter,  
8 the jury is excused.

9 If you have any questions, just send them  
10 through your foreman.

11 I am certain that this jury will abide by  
12 its oath which was to deliver a true and just  
13 verdict, and that means a verdict based on the  
14 evidence, free of all bias, prejudice and  
15 sympathy.

16 The jury is excused for deliberation on  
17 the matter.

18 (At 1:20 p.m. the jury left the Courtroom  
19 to begin its deliberations.)  
20  
21  
22  
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## AFTERNOON SESSION

THE CLERK: All rise.

THE COURT: Gentlemen and ladies, we have a verdict. Will you please seat the jury?

THE CLERK: Note from the jury marked Court's Exhibit 6 for identification.

(Whereupon, the jury entered the courtroom.)

THE COURT: Mr. Foreman, would you please stand? I have your note saying the jury has reached a verdict. The United States of America v. Armando Esparza, Delfin Leo Gonzalez, and Hector Christian.

As to count 1, how do you find the defendant Armando Esparza, guilty or not guilty?

THE FOREMAN: Guilty.

THE COURT: How do you find the defendant Delfin Leo Gonzalez, guilty or not guilty?

THE FOREMAN: Guilty.

THE COURT: As to the defendant Hector Christian, guilty or not guilty?

THE FOREMAN: Guilty.

THE COURT: As to count 2, how do you find the defendant Armando Esparza, guilty or not guilty?

THE FOREMAN: Guilty.

THE COURT: How do you find the defendant Delfin



1 Leo Gonzalez, guilty or not guilty?

2 THE FOREMAN: Guilty.

3 THE COURT: On count 3, how do you find the  
4 defendant Armando Esparza, guilty or not guilty?

5 THE FOREMAN: Guilty.

6 THE COURT: How do you find the defendant Delfin  
7 Leo Gonzalez, guilty or not guilty?

8 THE FOREMAN: Guilty.

9 THE COURT: Juror No. 2, is that your verdict?

10 JUROR NO. 2: Yes.

11 THE COURT: Juror No. 3, is that your verdict?

12 JUROR NO. 3: Yes.

13 THE COURT: Juror No. 4, is that your verdict?

14 JUROR NO. 4: Yes.

15 THE COURT: Juror No. 5, is that your verdict?

16 JUROR NO. 5: Yes.

17 THE COURT: Juror No. 6, is that your verdict?

18 JUROR NO. 6: Yes.

19 THE COURT: Juror No. 7, is that your verdict?

20 JUROR NO. 7: Yes.

21 THE COURT: Juror No. 8, is that your verdict?

22 JUROR NO. 8: Yes.

23 THE COURT: Juror No. 9, is that your verdict?

24 JUROR NO. 9: Yes.

25 THE COURT: Juror No. 10, is that your verdict?

1  
2 JUROR NO. 10: Yes.

3 THE COURT: Juror No. 11, is that your verdict?

4 JUROR NO. 11: Yes.

5 THE COURT: Juror No. 12, is that your verdict?

6 JUROR NO. 12: Yes.

7 THE COURT: And so say you all.

8 Are there any motions directed to the verdict  
9 before I excuse the jury?

10 MR. LAIFER: On behalf of my client, Armando  
11 Esparza, I wish to thank them for their endeavors.

12 MR. BELVEDERE: I, too, would also like to thank  
13 the jury.

14 THE COURT: It is very gracious for the  
15 defendants' counsel to thank the jury for their interest  
16 because they recognize and I recognize that you did the  
17 kind of job that we have come to expect of juries in  
18 this district; sincere effort to find a true and just  
19 verdict. You might be interested to know that this is  
20 a re-trial. I can tell you now. We didn't want to  
21 tell you before. The case was tried before. When there  
22 is a mistrial, a jury can't agree, I just declare a  
23 mistrial and set it down for trial again, but I under-  
24 stand that in that jury, 11 out of the 12 jurors arrived  
25 at a guilty verdict soon after I gave it to them for



1 deliberation, but for three days it was just one juror  
2 that either had an honest conviction that there wasn't  
3 enough evidence or just was the intransigent who  
4 refused to convict in spite of the evidence. At any  
5 rate, I think I can say that the Government's proof was  
6 just overwhelming, and there is no other way to  
7 evaluate it.

8  
9 Now, Mr. Small, do you have the jury verdict?

10 (The Foreman handed the verdict to the Court.)

11 THE COURT: Thank you. Before I discharge the  
12 jury, I want you to know that this may be the only  
13 opportunity the jurors have for forever serving again  
14 on a federal jury, at least in this district. Our  
15 master jury roll probably runs about 500,000 to 700,000  
16 citizens, so the likelihood of coming back again to  
17 serve in this court is slight. It is almost the same  
18 chance you have of winning a lottery ticket, and I  
19 think it is almost as beneficial. You don't receive  
20 the money that a lottery ticket runs, but you do receive  
21 the education and the insight into the machinery of the  
22 Government. You may never have this opportunity again.  
23 And just to think that you have served on a jury trial,  
24 you have been part of the administration of justice.  
25 You have been part of the Government. I think it is the

1           only opportunity a citizen has, except that of  
2           Government jobs, of actually being part of the Govern-  
3           ment. I think it is enlightening, it is educational,  
4           I think you have gained a lot from your service here,  
5           and I think that our Government's society has gained a  
6           lot from your service here, and we thank you for it.

7           The jury is discharged.

8           THE CLERK: Report to the Central Jury Room if  
9           you want any proof of jury service.

10          (Whereupon, the jury left the courtroom at  
11          1:15 p.m.)

12          THE COURT: Are there any applications of any  
13          kind to be made?

14          MR. LAIFER: Yes, your Honor.

15          MS. AMON: I will make one.

16          MR. LAIFER: For the record, your Honor, I  
17          would respectfully move to set aside the verdict on  
18          behalf of my client,

19          MR. BELVEDERE: I would like to make the same  
20          motion.

21          THE COURT: The motion on behalf of all the  
22          defendants is denied.

23          MS. AMON: At this time the Government would  
24          request that although Armando Esparza and Hector  
25          Christian have appeared all throughout the trial, in



PROOF OF SERVICE

JOSEPH L. BELVEDERE, being duly sworn, deposes and says that he is the attorney for HECTOR CHRISTIAN, the defendant-appellant herein. That on the 13th day of July, 1976, he served the within Appellant's Brief <sup>Appellant's Brief</sup> on:

The Honorable David G. Trager  
United States Attorney  
Eastern District of New York  
225 Cadman Plaza East  
Brooklyn, New York 11201

William J. Gallagher, Esq.  
The Legal Aid Society  
Attorney for Delfin "Leo" Gonzalez  
Federal Defender Services Unit  
509 United States Court House  
Foley Square, New York, New York. 10007

Stephen R. Laifer, Esq.  
Attorney for Appellant Esparza  
16 Court Street  
Brooklyn, New York. 11241

which addresses are the addresses designated by the said attorneys for that purpose, by depositing the same enclosed in a postpaid wrapper, properly addressed in a post office under the exclusive care and custody of the United States Post Office Department within the City of New York.

Sworn to before me this  
13th day of July, 1976.

*Richard H. Brennan*

*Joseph L. Belvedere*  
RICHARD H. BRENNAN  
NOTARY PUBLIC, STATE OF NEW YORK  
No. 24-0007382  
Qualified in Kings County  
Commission Expires March 20, 1977